

**Office of Chief Counsel  
Internal Revenue Service  
Memorandum**

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subject: Tribal Economic Development Bond volume cap allocation

This Chief Counsel Advice may not be used or cited as precedent.

**ISSUE**

What amount of volume cap allocation is needed for an issue of Tribal Economic Development Bonds that will currently refund the outstanding stated principal amount of an issue of original Tribal Economic Development Bonds and also finance issuance costs of the refunding issue?

**CONCLUSION**

A Tribal Economic Development Bond volume cap allocation is needed in an amount equal to the amount by which the issue price of the refunding bond issue exceeds the outstanding stated principal amount of the refunded bonds.

**FACTS**

An Indian tribal government ("Tribe") applied for and received an allocation of volume cap pursuant to § 7871(f) of the Internal Revenue Code (the "Code") to issue Tribal Economic Development Bonds. Tribe timely used its volume cap allocation to issue bonds (the "Original Bonds") and designated the Original Bonds as Tribal Economic Development Bonds. The amount of the Original Bonds did not exceed the amount of

the volume cap allocation received. The Original Bonds were not issued with more than a *de minimis* amount of original issue discount or premium. Tribe would now like to currently refund the Original Bonds, which have an outstanding stated principal amount of \$75 million. Tribe also wants to finance the \$1 million issuance costs of the refunding bonds. The current refunding issue will meet all applicable requirements for the issuance of Tribal Economic Development Bonds excluding bond volume cap.

### LAW AND ANALYSIS

Section 103(a) provides that gross income does not include interest on a State or local bond. Section 103(c)(1) provides that the term “State or local bond” means an obligation of a State or political subdivision thereof.

Section 7871(a)(4) treats an Indian tribal government as a State for purposes of § 103, subject to § 7871(c). Section 7871(f)(1) provides that the Treasury Department shall allocate the \$2 billion national volume cap for Tribal Economic Development Bonds among the Indian tribal governments in such manner as the Treasury Department, in consultation with the Secretary of the Interior, determines appropriate. Section 7871(f)(2)(A) provides that notwithstanding the provisions of § 7871(c), Tribal Economic Development Bonds are treated for purposes of the Code as if they were issued by a State. Sections 7871(f)(2)(B) and (C) provide that an Indian tribal government issuing a Tribal Economic Development Bond shall be treated as a State for purposes of § 141 and that the volume cap requirement of § 146 does not apply. Section 7871(f)(3)(A) defines a Tribal Economic Development Bond generally to mean any bond the interest on which would be exempt from tax under § 103 if issued by a State or local government, and which is designated by the Indian tribal government as a Tribal Economic Development Bond for purposes of § 7871(f). Section 7871(f)(3)(C) provides that the maximum aggregate face amount of bonds that may be designated by an Indian tribal government shall not exceed the amount of national tribal economic development bond limitation allocated to such government.

Notice 2019-39, 2019-24 I.R.B. 1322, provides guidance regarding the issuance of Tribal Economic Development Bonds under § 7871 in current refunding issues (as defined in § 1.150-1(d)(3) of the Income Tax Regulations) to refund original Tribal Economic Development Bonds. Section 4 of Notice 2019-39 provides in part that any current refunding issue the proceeds of which are used to refund original Tribal Economic Development Bonds may be issued without regard to volume cap if (1) the original Tribal Economic Development Bonds were issued with any required volume cap allocation, (2) the issue price of the current refunding issue is no greater than the outstanding stated principal amount of the refunded bonds, and (3) the current refunding issue meets all applicable requirements for the issuance of Tribal Economic Development Bonds excluding bond volume cap. For refunded bonds originally issued with more than a *de minimis* amount of original issue discount or premium (as defined in § 1.148-1(b)), the present value of the refunded bonds (as determined under § 1.148-

4(e)), must be used in lieu of the outstanding stated principal amount to determine the maximum issue price of the refunded issue.

Tribe wants to issue a total of \$76 million of refunding Tribal Economic Development Bonds that includes \$75 million to pay off the outstanding stated principal amount of the Original Bonds plus \$1 million to pay for the issuance costs of the refunding Tribal Economic Development Bonds. The issue raised is whether Tribe needs an additional Tribal Economic Development Bond volume cap allocation of \$76 million or only \$1 million. Section 4 of Notice 2019-39 permits current refunding bonds “without regard to any volume cap” if the issue price of the current refunding bonds is no greater than the outstanding stated principal amount (or present value, if applicable) of the prior bonds. We conclude that Notice 2019-39 does not require Tribe to obtain additional Tribal Economic Development Bond volume cap allocation for the amount needed to pay off the outstanding stated principal amount of the Original Bonds (\$75 million). However, any portion of a refunding issue used to finance costs in excess of the outstanding stated principal amount of the refunded Tribal Economic Development Bonds (or present value, if applicable), such as costs of issuance, would need a Tribal Economic Development Bond volume cap allocation. Thus, we conclude that, under Notice 2019-39, Tribe would need an additional Tribal Economic Development Bond volume cap allocation of \$1 million for the amount of bonds issued to finance the issuance costs of the refunding bonds.

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Please call Johanna Som de Cerff at (202) 317-4567 or David White at (202) 317-4562 if you have any further questions.